83-1693

(1)

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
State of Florida, et al.,

Petitioners,

vs.

RAYFIELD BYRD,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of
Appeal for the Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General

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48 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision below improperly invests the United States District Court with the power to determine a question of Florida state-court jurisdiction.

2. Whether the Fourteenth Amendment requires that a state provide an indigent defendant with a copy of his state-court trial transcript for use by that defendant in the preparation of a petition for writ of certiorari to be filed in the state Supreme Court.

3. Whether the Fourteenth Amendment requires that a state provide an indigent defendant with a copy of his state-court trial transcript after that defendant has perfected his initial appeal taken as a matter of right but where the defendant has not demonstrated a need for the transcript.

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The per curiam opinion of the United States Court of Appeals, Eleventh Circuit, published at 722 F.2d 716 (11th Cir. 1984), appears in the appendix hereto as "A.1 - A.17"

JURISDICTION

On January 13, 1984, the United States Court of Appeals for the Eleventh Circuit reversed and remanded an Order of the United States District Court denying a petition for writ of habeas corpus brought by a state prisoner pursuant to 28 U.S.C. §2254. A timely petition for rehearing was denied on February 21, 1984, and this Petition for Certiorari was filed within sixty (60) days of this date. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Rule 17 of the Rules of the Supreme Court, Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment X of the Constitution of the United States provides that:

> " The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendment XIV, Section 1 of the Constitution of the United States provides that:

> " All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The respondent, Rayfield Byrd, is an inmate of the Florida Department of Corrections. He was indicted by the Grand Jury of Hillsborough County, Florida, on April 9, 1975, on charges of first-degree murder and robbery. After a trial by jury, the respondent was found guilty as charged in both counts of the indictment and was sentenced to life for the murder and to ninety-nine (99) years for the robbery.

The respondent took an appeal of his conviction and sentence to the Florida District Court of Appeal, Second District. The public defender's office of the Thirteenth Judicial Circuit was appointed to represent Byrd on appeal. On or about September 22, 1976, the public defender filed an "Anders" brief pursuant to the decision of Anders v. California, 386 U.S.

738 (1967), asking to be allowed to withdraw as counsel inasmuch as the public defender could not find any arguable grounds for appeal. On September 27, 1976, an Order was entered by the Clerk of the Second District Court of Appeal advising that respondent could file a pro se brief as to any matter that respondent felt should be considered by the court. On or about October 8, 1976, the respondent filed an additional brief, handwritten, consisting of some twenty-nine (29) pages and raising some seven (7) separate issues on appeal. On or about October 12, 1976, the State of Florida filed a supplemental brief of appellee in response to the brief submitted by Byrd. Also on October 12, 1976, respondent received his trial transcript and acknowledged receipt of same.

On or about October 18, 1976, the respondent filed a reply brief to the supplemental brief filed by the State of Florida. On or about October 20, 1976, respondent filed an additional reply brief.

On January 19, 1977, the Second District Court of Appeal, after noting the filing of a pro se brief on respondent's behalf, ordered the transcript and record on appeal be relinquished by the respondent so that his brother could write his own pro se brief. Byrd, nevertheless, did not turn over the transcript until March 2, 1977.

On or about May 18, 1977, the respondent filed another supplemental point on appeal to be considered by the Second District Court of Appeal. On August 12, 1977 the Second District Court of Appeal per curiam affirmed respondent's conviction.

In April, 1980, respondent filed a petition for writ of habeas corpus in the Eighth Judicial Circuit of Florida in and for Union County. On February 24, 1981, the Honorable Benjamin Tench, Circuit Judge, denied the petition for writ of habeas corpus but directed the State to furnish petitioner with his trial transcript. On or about February 28, 1981, the State filed a Motion for Rehearing, and upon that motion, the trial court quashed its directive that the transcript be furnished to Byrd.

Respondent then sought Federal habeas relief alleging, as he did in the state trial court habeas proceedings, that he was denied meaningful access to the courts. The habeas petition was dismissed for lack of merit by the United States District Court, Middle District of Florida, and an appeal was commenced in the

United States Circuit Court of Appeals, Eleventh Circuit. The Court of Appeals for the Eleventh Circuit reversed the judgment of the District Court (A.1 - A.17), and following the denial of a timely motion for rehearing (A.18 - A.19), the State of Florida sought certiorari review in this Court.

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW RAISES A SIGNIFICANT FEDERAL QUESTION AS TO THE EXTENT OF A FEDERAL COURT'S INVOLVEMENT IN THE DETERMINATION OF A STATE COURT'S JURISDICTION.

The decision below concluded by ordering that the instant cause be remanded to the district court for an evidentiary hearing. Pursuant to the findings developed at the evidentiary hearing, the district court is to determine whether Byrd was prevented by the state from obtaining access to his state court trial transcripts. The Eleventh Circuit determined that should the district court deem that the evidence demonstrated lack of access, respondent would prevail only if he can identify a basis for conflict certiorari jurisdiction. By doing so, the Eleventh Circuit has improperly invested

the District Court with the power to determine a matter of Florida state court jurisdiction.

The Supreme Court of Florida is the final and unreviewable interpreter of Florida State law and, with respect to matters of state law, the decisions of that court binds everyone. Scripto, Inc. v. Carson, 362 U.S. 207 (1960); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Berea College v. Kentucky, 211 U.S. 45 (1980); Murdock v. Memphis, 20 Wall. 590 (1975). This doctrine is also applicable with respect to issues concerning state court jurisdiction. The Florida Supreme Court is the final authority with respect to state court jurisdiction, and that court's interpretation of Florida jurisdiction should not be interfered with. See Dresner v. Tallahassee, 375 U.S. 136 (1963); Dresner v. Tallahassee, 378 U.S.

539 (1964).

Again, this Court in Callendar v. Florida, 380 U.S. 519 (1965), and Callendar v. Florida, 383 U.S. 270 (1966), recognized tnat it was bound by the Florida Supreme Court's determination regarding the jurisdiction of courts in Florida.

This court has recently determined that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. Wainwright v. Goode, __ U.S. __ 78 L.Ed.2d 187 (1983). It follows that since this Court has recognized the exclusive authority of the Florida Supreme Court to determine the jurisdiction of the several courts of the State of Florida, see Dresner v. Tallahassee, supra, a federal court should not intervene in the judicial

process with respect to questions of state-court jurisdiction. Thus, the decision below conflicts with the holdings of this Honorable Court insofar as it confers power upon a district court to determine if respondent has identified a basis for conflict certiorari jurisdiction. This is especially so considering that the conflict certiorari jurisdiction of the Florida Supreme Court is wholly discretionary and it does not appear that a federal court could ever make the decision as to which case the Florida Supreme Court might accept for review.

2. THE DECISION BELOW IMPROPERLY EXTENDS THE HOLDING OF THIS HONORABLE COURT IN GRIFFIN V. ILLINOIS, 351 U.S. 12 (1956).

In Griffin v. Illinois, 351 U.S. 12

(1956), this Honorable Court determined, inter alia, that it is unconstitutionally violative of the Fourteenth Amendment to predicate an appeal by an indigent defendant upon obtaining a trial transcript. Inasmuch as an indigent could not pay the costs of obtaining a trial transcript, that defendant was effectively prohibited from taking an initial appeal from his conviction of guilt. In the decision below, however, the court appears to extend the rationale of Griffin to require that an indigent defendant is entitled to a trial transcript subsequent to the perfection of the intial appeal taken as a matter of right. Specifically, the decision below requires the state to provide an indigent defendant with a trial transcript where that defendant seeks discretionary certiorari review with the

state's supreme court. Such a conclusion is not constitutionally mandated.

Access to courts may not be predicated upon financial consideration. Griffin, supra; Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959). In other words, it is constitutionally impermissible for a state to adopt procedures which leave an indigent defendant "entirely cut off from any appeal at all" by virtue of his indigency. Lane v. Brown, supra at 481. However, the instant cause does not represent a case in which an indigent defendant has been cut off from any appeal. Rather, the question presented involves whether a state is constitutionally mandated to provide a trial transcript to an indigent defendant when that defendant chooses to pursue

discretionary relief. Inasmuch as the Fourteenth Amendment does not require absolute equality or precisely equal advantages, San Antonio Independant School District v. Rodriguez, 411 U.S. 1 (1973), it is not constitutionally mandated that a state provide an indigent with a copy of his state court trial transcript for any and all discretionary proceedings which that indigent defendant may wish to pursue.

3. THE DECISION BELOW CONFLICTS WITH THIS HONORABLE COURT'S DECISION IN DRAPER V. WASHINGTON 372 U.S. 487 (1963), IN THAT THE COURT BELOW HAS DETERMINED THAT THE STATE MUST PROVIDE AN INDIGENT DEFENDANT WITH A STATE COURT TRIAL TRANSCRIPT EVEN WHERE THE DEFENDANT HAS NOT DEMONSTRATED A NEED FOR THAT TRANSCRIPT.

In Draper v. Washington, supra, this Honorable Court determined that a state is not required to furnish a transcript of state court trial proceedings to the extent to which such a transcript is not germane to consideration of a defendant's appeal.

In both the District Court and the Circuit Court of Appeals, the respondent herein has never alleged that the State of Florida denied him access to his trial transcript. Respondent instead complains that the state court authorities confiscated his transcript prior to the determination of his direct appeal to the Second District Court of Appeal. However, the transcript was not confiscated by state officials merely for the purpose of harrasing petitioner or for denying him access to that transcript. Rather, the

transcript was confiscated pursuant to court order to enable respondent's brother, Ernest Byrd, to file a pro se brief where his appellate public defender previously filed an Anders Brief. Thus, in order to satisfy Ernest Byrd's constitutional right to a transcript for use upon direct appeal, it was essential that the transcript be removed from the possession of Rayfield Byrd so that Ernest Byrd could also use the transcript.

It is not constitutionally required that the state provide each convicted co-defendant with his own copy of the trial transcript. It appears that if each co-defendant has access to a transcript, no constitutional rights have been infringed. See Wade v. Wilson, 396 U.S. 282 (1970).

Respondent has never alleged in the courts below that he sought return of the

transcript after his brother had used the same in the preparation of his pro se appeal. Nevertheless, it is apparent that respondent has never demonstrated a need for the transcript which was reportedly denied to him by state action. In Florida, it is no longer possible to seek discretionary certiorari review in the Supreme Court where the District Court of Appeal renders a per curiam affirmed in its opinion.[1] However, in 1977, appellant could have sought conflict certiorari. Nevertheless, even if respondent had decided to pursue conflict certiorari to the Florida Supreme Court, it is apparent

---

[1] The discretionary jurisdiction of the Florida Supreme Court is now limited, inter alia, to those decisions of District Courts of Appeal that expressly and directly conflict with a decision of another District Court of Appeal or of the Supreme Court in the same question of law. Fla. R. App. P. 9.030(a)(2)(A)(IV); Art. V, §3(b)(3), Florida Constitution.

that the use of the transcript would have been no aid in that pursuit. When conflict certiorari was permitted to be established subsequent to the entry to a per curiam affirmance opinion, the Florida Supreme Court in its process of determining whether conflict existed was restricted to examination of the opinion and the record proper, exclusive of the transcript of testimony. Foley v. Weaver Drugs, 177 So.2d 221 (Fla. 1965). Hence, respondent has never established a need for the state court trial transcript and, therefore, the decision below incorrectly determined that respondent had a right to that transcript under the Fourteenth Amendment.

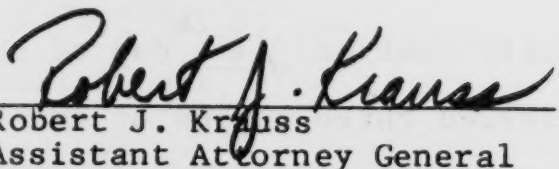
CONCLUSION

For these reasons, petitioner respectfully urges this court to grant certiorari and reverse the decision of the Court of Appeals in and for the Eleventh

Circuit.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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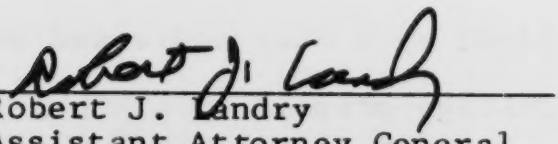

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CERTIFICATE OF SERVICE

I, ROBERT J. LANDRY, Counsel for Respondent, and a member of the Bar of the United States Supreme Court, hereby certify that on 16TH day of April 1984, I served three copies of the Petition for Writ of Certiorari on Rayfield Byrd, #A024926, Union Correctional Institute, Post Office Box 221, Raiford, Florida 32083 by a duly addressed envelope with postage prepaid.

Robert J. Landry
Assistant Attorney General

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
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vs.

RAYFIELD BYRD,

Respondent.

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Appeal for the Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION AND APPENDIX

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BYRD V. WAINWRIGHT

Rayfield BYRD, Petitioner,

v.

Louie L. WAINWRIGHT, et al.,

Respondents.

No. 82-3029

Non-Argument Calendar

United States Court of Appeals

Eleventh Circuit

Jan. 13, 1984.

Relief in habeas corpus was denied by the United States District Court for the Middle District of Florida at Tampa, William J. Castagna, J., and prisoner appealed. The Court of Appeals held that (1) all who pursue articulable claims upon direct appeal, whether as of right or by leave, are assured access to transcript to aid their preparation; (2) denial of access to transcript is incompatible with

effective appellate advocacy, whether advocate be counsel or defendant alone; and (3) where record nowhere reflected whether defendant was denied by virtue of indigency, access to his trial transcript in 30 days immediately following entry of judgment by District Court of Appeal in Florida, judgment of district court would be reversed and case remanded, on his appeal, for evidentiary hearing to develop facts requisite to his claim, and if evidence demonstrated lack of access, he was to prevail only if he could identify basis for conflict certiorari jurisdiction.

Reversed and remanded.

1. Habeas Corpus 45.3(1)

By failure to raise any objection it might have had in United States Court of Appeals or in court below, state waived requirement of exhaustion before resort to

habeas corpus. 28 U.S.C.A. § 2254(b, c).

2. Habeas Corpus 45.2(2)

Federal habeas relief is appropriate vehicle for reviewing Fourteenth Amendment challenges to state appellate procedures. 28 U.S.C.A. § 2254(b-d) (d)(3). U.S.C.A. Const.Amend. 14.

3. Constitutional Law 268.2(3)

Fourteenth Amendment guarantees constitutional right of access to state courts which assures indigent defendant adequate opportunity to present his claims fairly,and indigents who pursue articulable claims upon direct appeal share same rights accorded others to invoke review, including access to transcript to aid their preparationm, and same is true whether appeal is discretionary or rather as of right. 28 U.S.C.A. § 2254(b-d); U.S.C.A. Const. Amend. 14.

4. Criminal Law 1077.2(1)

Impoverished defendant who seeks transcript must first articulate claim which necessitates reference to record, but once he has done so, right of access inheres regardless of merits of asserted claim to assure that frivolity will be tested on same basis by reviewing court for rich and poor alike. U.S.C.A Const. Amend. 14.

5. Criminal Law 1101

Fact that intermediate court in Florida affirmed conviction without opinion did not foreclose possibility of conflict certiorari, West's F.S.A. R.App.P.Rule 9.030(a)(2)(A)(iii, iv), West's F.S.A. Const. Art. 5, § 3(b)(3).

6. Criminal Law 1077.2(1)

Denial of access to transcript is incompatible with effective appellate

advocacy, whether advocate be counsel or defendant alone. 28 U.S.C.A. § 2254(b, c). U.S.C.A. Const.Amends. 6, 14.

7. Habeas Corpus 113(13)

Where record nowhere reflectd whether defendant was denied, by virtue of indigency, access to his trial transcript in 30 days immediately following entry of judgment by District Court of Appeal in Florida, judgment of district court was reersed, and case remanded, on his appeal, for evidentiary hearing to develop facts requisite to his claim, and if evidence demonstrated lack of access, he was to prevail only if he could identify basis for conflict certiorary jurisdiction. 28 U.S.C.A. § 226.4(d), (d)(3), West's F.S.A. R. App. P. Rule 9.030(a)(2)(A)(iii, iv), West's P.S.A. Const. Art. 5, § (3)(b)(3).

Appeal from the United States District Court for the Middle District of Florida.

Before FAY, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM.

In this habeas proceeding, we consider whether an indigent prisoner has a constitutional right to a transcript in order to petition the state supreme court for discretionary direct review of his conviction.

In 1975, a Florida state jury convicted Rayfield Byrd of first-degree murder and robbery. Following sentencing,[1] Byrd filed an appeal as of right with the Florida District Court of Appeal, Second District. The court determined that Byrd

1. He is serving sentences of life imprisonment for the murder and ninety-nine years for the robbery.

was indigent and appointed a public defender to represent him. Byrd's attorney received leave to withdraw as counsel after he filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) stating that he discovered no colorable ground for appeal. Byrd then undertook to prepare a brief himself. On October 12, 1976, four days after his pro se brief was filed, Byrd received a copy of his trial transcript. He filed two reply briefs within the next eight days.

On January 10 of the following year, the state appeal court ordered Byrd to reliquish his copy of the transcript so that his brother, a codefendant, could write his brief in turn. Byrd complied on March 2. On May 18, he submitted a suppemental brief. The court affirmed his conviction without opinion on August 12.

He failed to seek discretionary review to the Florida Supreme Court within the thirty days allotted by law.

In 1980, Byrd filed a petition for habeas corpus in Florida circuit court, claiming that his inability to reexamine his trial transcript following confirmation impaired his constitutional right of access to the courts. The state habeas court denied the writ but ordered respondents, state correctional authorities, to furnish Byrd with a copy of his trial transcript. This latter order was quashed upon rehearing after respondents argued that it was the responsibility of the county government, not respondents, to bear the costs of an indigent prisoner's appeal.

Byrd then sought federal habeas relief. The court below granted him leave to proceed in forma pauperis. On the

merits, Byrd challenged denial of the transcript for purposes of intermediate direct review, state certiorari and federal habeas. The magistrate concluded that confiscation of the transcript did not impair the constitutional rights attending Byrd's intermediate state appeal. Byrd's other claims were not addressed. The district court adopted the magistrate's recommendation and denied the writ without an evidentiary hearing.

Byrd now comes before this court challenging denial of the writ. He renews his argument that his inability to consult his trial transcript made barren his constitutional right of access to the courts.

[1, 2] Byrd first argues that this impediment barred him from seeking conflict certiorari to the Florida Supreme Court following his defeat on direct review. According to Byrd, he was unable to

prepare a certiorari petition because he lacked the assistance of a transcript. The state concedes that Byrd had a right to petition the Florida Supreme Court for discretionary review to resolve conflicting state court opinions under rules in effect in 1977.[2] It contends, however, that Byrd stood to derive no further benefit from rrexamining the transcript he had already consulted.[3]

2. Fla.R.App.P. 9.030(a)(2)(A)(iii) (1977). Until 1980, the Florida Supreme Court reviewed "instances of discernable conflict to district court decisions affirming without opinion the orders of trial courts." 381 So.2d 1375 (Fla. 1980). The rule was amended in 1980 to accord with a state constitutional amendment limiting conflict certiorari to conflict amont written opinions. Fla.R.App.P. 9.030(a)(2k)(A)(iv) (1983). See 391 So.2d 203,204 (Fla. 1980); 381 So.2d at 1371; Fla. Const. art. V. § 3(b)(3).

3. By failing to raise any objection it might have had in this court or that below, the state has waived the exhaustion requirement of 28 U.S.C. § 2254(b),(c), Lamb v. Jernigan, 683 F.2d 1332,1335, n.1

[3] We are compelled to differ. It is by now well established that a state which grants appellate review must do so in a way which does not prejudice convicted defendants on account of their poverty. Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 685, 690 100 L.Ed.891 (1956). The fourteenth amendment guarantees a constitutional right of access to state courts which assures the indigent defendant an adequate opportunity to present his claims fairly. Ross v. Moffitt, 417 U.S. 600, 606-609, 616, 94 S.Ct. 2437, 2441-2442, 2443, 2446, 41 L.Ed.2d 341 (1974). Whether

(11th Cir. 1982), cert. denied ___ U. S. ___, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983).

We note that federal habeas relief is an appropriate vehicle for reviewing fourteenth amendment challenges to state appellate procedures. See Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

an appeal is discretionary or rather as of right, indigents share the same rights accorded others to invoke review. Burns v. Ohio, 360 U.S. 252, 257-58, 79 S.Ct. 1164, 1168-1169, 3 L.Ed.2d 1209 (1959). By extension, all who pursue articulable claims upon direct appeal, whether as of right or by leave, are assured access to a transcript to aid their preparation. Mayer v. City of Chicago, 404 U.S. 189, 190-91, n. 1, 92 S.Ct. 410, 412-413, n. 1, 30 L.Ed.2d 372 (1971).

[4, 5] An impoverished defendant who seeks a transcript must first articulate a claim which necessitates reference to the record. Draper v. Washington, 372 U.S.

487, 495, 83 S.Ct. 774, 778-779, 9 L.Ed.2d 899 (1963).[4] Once petitioner has done so, his right of access inheres regardless of the merits of the asserted claim to assure that frivolity "will be tested on the same basis by the reviewing court" for rich and poor alike.[5] Id. at 499, 83 S.Ct. at 781.

[6] The state responds that no record need be forthcoming since Byrd had no

4. In Draper, the Court held that "[a]lternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." Id. Since the record does not reveal whether Byrd had any access to the record for purposes of cetiorari, we need not now decide what precise form of access would satisfy constitutional requirements.

5. The state argues that Byrd had already briefed his claims in the intermediate appeals court and therefore had no further need of a transcript. The record before us is however too scant to admit or deny the truth of the assertion. Byrd's intent

right to court-appointed counsel for siacretionary review. In Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), the Supreme Court held that the right to counsel does not attend discretionary review. It reached that outcome, however, because prisoners would "have at the very least, a transcript or other record of trial proceedings . . .

to invoke the conflict jurisdiction of the state supreme court presumably would involve discussion of an issue not before briefed, namely the conflict. See Ross v. Moffitt, 417 U.S. at 615, 94 S.Ct. at 2446. The fact that the state intermediate court affirmed Byrd's conviction without opinion did not foreclose the possibility of conflict certiorari. See supra note 2. Before 1980 review of conflicts among written decisions and those rendered without opinin "comprised the overwhelming bulk of the [state supreme court's] caseload." 381 So.2d 1370, 1375 (Fla. 1980. A transcript may well be a necessary adjunct to preparation of a petition for review where the asserted conflict turns on factual distinctions among decisions.

and in many cases an opinion by the [court below] disposing of [their case]." Id. at 615, 94 S.Ct. 2446.[6] See also Bounds v. Smith, 430 U.S. 817, 927, 97 S.Ct. 1491, 1497, 52 L.Ed.2d 72 (1971). We agree that denial of access to the transcript is incompatible with

6. In Perry v. State, 456 F.2d 879 (5th Cir. 1972), cert. denied 409 U.S. 916, 95 S.Ct. 248, 34 L.Ed.2d 178 (1972), defendant's court-appointed counsel filed an Anders brief upon appeal as of right. When Perry then attempted to draft a pro se brief, he was denied access to his trial transcript. We denied relief, noting that "counsel did have a transcript on appeal and did file a brief with the state appellate court in appellant's behalf." Id. at 881-882.

In Perry, defendant had the initial benefit of counsel in preparing the appeal during which access to the transcript was denied. Byrd by contrast had no right to counsel in seeking the discretionary review of the Florida Supreme Court. We believe furthermore that application of Perry to the case at hand would run afoul of the basic premise of Ross v. Moffitt, decided by the Supreme Court after Perry. We, therefore, decline to extend Perry to this case.

effective appellate advocacy," Hardy v. United States, 375 U.S. 277, 288, 84 S.Ct. 424, 431, 1 L.Ed.2d 331 (1964) (Goldbegh, J. concurring), whether the advocate be counsel or defendant alone.[7]

[7] The state contends that no further evidentiary hearing is needed under Townsend v. Sain, 372 U.S. 293, 313, 83 S.Ct. 746, 747, 9 L.Ed.2d 770 (1962) (codified at 28 U.S.C. § 2254(d)), to resolve Byrd's claim. Contrary to the state's assertion, however, the record nowhere reflects whether Byrd was denied

7. The state cites Moore v. Wainwright, 633 F.2d 406 (5th Cir. 1980), in support of its position. Moore, however, involved a wholly different issue. After first reaffirming the Griffin principle according indigent defendants a transcript on appeal, id. at 408, the Moore panel proceeded to consider when that right first attaches. Byrd's claim, in contrast, plumbs the duration of the right to transcript once the defendant has perfected the initial appeal.

by virtue of indigency access to his trial transcript in the thirty days immediately following entry of judgment by the Second District Court of Appeal. We therefore reverse the judgment of the district court and remand in accordance with 28 U.S.C. § 2254(d)(3) for an evidentiary hearing to develop the facts requisite to Byrd's claim. If the evidence demonstrates lack of access, Byrd shall prevail only if he can identify a basis for conflict certiorari jurisdiction.

Because we rule in Byrd's favor with respect to the issue of discretionary review, we do not reach the transcript claims he presses with respect to his intermediate state appeal and federal habeas review.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-3029

RAYFIELD BYRD,

Petitioner,

versus

LOUIE L. WAINWRIGHT, ET AL.,

Respondent.

- - - - - - - - - - - - - -

Appeal from the United States
District Court for the
Middle District of Florida

- - - - - - - - - - - - - -

ON PETITION FOR REHEARING

(FEB 21 1984)

Before Fay, Vance and Kravitch, Circuit Judges.

PER CURIAM

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

(s)
United States Circuit Judge

REHG-4
(Rev. 6/82)

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-3029

Non-Argument Calendar

D.C. Docket No. 81-00637

RAYFIELD BYRD,

Petitioner-Appellant,

versus

LOUIS L. WAINWRIGHT, et al.,

Respondents-Appellees.

- - - - - - - - - - - - -

Appeal from the United States
District Court for the
Middle District of Florida

- - - - - - - - - - - - -

Before FAY, VANCE and KRAVITCH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be and the same is hereby, REVERSED; and that this cause be, and the same is hereby, REMANDED to said District court in accordance with the opinion of this Court.

Entered: January 13, 1984
For the Court: Spencer D. Mercer, Clerk

By: /s/
Deputy Clerk

ISSUED AS MANDATE: FEB 29, 1984